

Bay St. Louis Waveland School District

Denial of Eligibility of Additional Work Items

Project Worksheets: 930, 7803, 7807, 9305, 9307, 9316,

9368, 9395, 9397, 9427, 9681, and 9682

FEMA-1604-DR-MS

Docket # CBCA 1739-FEMA

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RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO
ARBITRATION REQUEST OF BAY ST. LOUIS WAVELAND SCHOOL
DISTRICT, BAY ST. LOUIS, MS

On October 1, 2009, the Federal Emergency Management Agency ("FEMA") received the request of Bay St. Louis Waveland School District ("BWSD"), Bay St. Louis, Mississippi, to arbitrate FEMA's decision to deny BWSD's request for an additional \$7,273,082 for repairs to roofs, windows, and siding of several school facilities. This document, with attached declarations and exhibits, constitutes FEMA's response to BWSD's arbitration request.

ARBITRATION PANEL JURISDICTION

- Project Worksheets (PW) 930, 7803, 7807, 9305, 9307, 9316, 9368, 9395, 9397, 9427, 9681, and 9682 represent eligible damage to BWSD facilities and are considered by FEMA to be one Project.

- The arbitration request for \$7,273,082 exceeds the \$500,000 project threshold.
- BWSD has opted to file this arbitration request in lieu of filing a first appeal.
- BWSD has met the September 30, 2009, arbitration request submittal deadline.
- The arbitration request was filed by letter dated September 30, 2009, with all supporting documentation.

SUMMARY OF FEMA'S POSITION

Following Hurricane Katrina, FEMA approved a Stafford Act grant in the amount of \$59,038,635 for repair of disaster-related damage to BWSD's school facilities, replacement of contents, and the permanent relocation of one elementary school for BWSD.¹ FEMA deducted insurance proceeds that BWSD received from its insurance carriers from the approved amount as required by the Stafford Act, and obligated \$46,180,182 for the permanent recovery of BWSD's school facilities, textbooks, and other facility contents.

On May 15, 2009, over 32 months after BWSD agreed that FEMA had captured all of its disaster damage on project worksheets, the State of Mississippi, ("Grantee"), requested that FEMA re-inspect several facilities for additional disaster-related damage to roofs, windows and siding. The Grantee estimated the cost to repair or replace these additional work items was \$7,216,656. See Applicant Exhibit Q. FEMA re-inspected Bay High

¹ FEMA also determined that BWSD was eligible for an additional \$2,071,246 for debris removal, emergency protective measures, and vehicle replacement.

School, Bay Waveland Middle School, and Waveland Elementary and identified an additional \$176,407 in eligible disaster-related damage.

FEMA asserts that the remainder of the costs sought by BWSD is not eligible for a Public Assistance grant because Hurricane Katrina did not cause the additional “damage” to the facilities. FEMA made this determination based upon FEMA’s assessment of the physical evidence and the professional judgment of highly qualified technical experts. Supporting this determination is the fact that BWSD did not request that FEMA re-assess its estimates of eligible damage until nearly forty-four (44) months after Hurricane Katrina and thirty-two (32) months after the BWSD agreed that all damage surveys had been completed and all damage recorded on project worksheets.

In addition, BWSD had \$29 million in insurance coverage for wind damage. However, it settled for only \$13 million. This suggests that the insurance carriers had similar concerns over the cause or extent of the disaster-related damage that the buildings sustained.

Section 406 of the Stafford Act and Title 44 Code of Federal Regulations, Part 206 authorize FEMA to fund the repair of disaster-related damage only. See 42 U.S.C. § 5172 and Title 44 Code of Federal Regulations (hereafter C.F.R.) § 206.223 (a)(1). The damage for which BWSD requested FEMA funding does not meet this criterion.

BACKGROUND

Public Assistance Pursuant to the Stafford Act

FEMA, a component agency of the United States Department of Homeland Security, is responsible for administering and coordinating the Federal governmental response to Presidential-declared disasters pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).² See 42 U.S.C. §§ 5121 *et seq.* Assistance pursuant to the Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a “major disaster.” See 42 U.S.C. § 5170; 44 CFR §§ 206.36; 206.38. Once a disaster is declared, the President determines the types of discretionary assistance that may be made available in the declared area. See 42 U.S.C. § 5170.

Among other types of assistance available under the Stafford Act, FEMA may provide grants for Public Assistance (“PA”). Specifically, the Stafford Act states that FEMA “may make contributions” for the repair, restoration, and replacement of damaged facilities. See 42 U.S.C. § 5172. FEMA may, at its discretion, provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the Subgrantee, facility, and work meet eligibility requirements.

Subgrantees are local governments or other legal entities, such as BWSD, which are

² The Stafford act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. See 42 U.S.C. § 5164.

eligible to receive Federal financial assistance for disaster damages. See 44 C.F.R. §§ 206.200 - 229. FEMA can provide PA funding in the form of grants for the state or local government's own recovery efforts, see 44 C.F.R. § 206.203, or FEMA may fund direct Federal assistance through which a Federal agency performs the emergency response work. See 44 C.F.R. § 206.208. FEMA may fund permanent repairs or replacement costs to restore eligible facilities on the basis of the design of such facilities as they existed prior to the disaster. See 44 C.F.R. § 206.226. FEMA PA may also fund the relocation of eligible destroyed facilities if the existing facility is subject to repetitive heavy damage and the overall project is cost effective. See 44 C.F.R. § 206.226(g). FEMA's main objective is to provide Federal disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the Subgrantee's facility and work meet eligibility requirements. See 44 C.F.R. §§ 206.200 - 229.

To receive PA funding for permanent restorative work, an eligible Subgrantee must have a facility that was damaged by a declared major disaster; that facility must be within the disaster-declared area; and, that facility and the work to repair it must be the legal responsibility of the eligible Subgrantee. See 42 U.S.C. § 5122; 44 C.F.R. §§ 206.221 - .223; 206.226(c)(1). With PA, a Federal inspection team accompanied by the Subgrantee's local representative surveys the damaged facilities and estimates the scope and cost of necessary repairs. See 44 C.F.R. § 206.202(d). The inspectors record the information they gather on project worksheets ("PWs"). Id. PWs record the estimate of

damage caused by the disaster, whether the repair work is eligible for PA, and list, among other information, the scope and “quantitative estimate for the cost of eligible work.” Id.

After PW completion, FEMA reviews the completed PW in order to determine whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available (*i.e.*, “obligate”) based on the approved PW. See 44 C.F.R. § 206.202(e). A PW is not a contract between FEMA and the State and/or Subgrantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds. See 44 C.F.R. § 206.202(d). Rather, a PW establishes the scope of work and provides cost estimates based upon the engineering analysis and on-site investigation, of the anticipated cost of a project. See Id. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635 (3rd Cir. 1998) (providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

FEMA obligated 68 PWs for BWSD in the amount of \$46,180,182 after insurance reductions for permanent restorative work.³

³ This total includes insurance coverage for lost vehicles which are not at issue in this dispute FEMA prepared one PW to cover vehicle losses. Public Assistance supplements financial assistance that the Subgrantee receives from other sources. By statute, FEMA cannot provide PW for damage or losses covered by insurance, or that duplicate assistance available from any other source. FEMA will subtract insurance coverage from all applicable PW grants to avoid duplication of financial assistance. See 42 U.S.C. § 5121; § 5155

The State of Mississippi is the Grantee for all FEMA Public Assistance delivered in the state. See 44 C.F.R. § 206.201(e). BWSD is a Subgrantee of the State. See 44 C.F.R. § 206.201.

This Panel must afford considerable deference to FEMA's interpretation of the statutory scheme it has been entrusted to administer, and to its own regulations. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Udall v. Tallman, 380 U.S. 1, 16-17 (1965)(explaining that the "ultimate criterion is the administrative interpretation, which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation"); Hawaiian Elec. Co., Inc. v. E.P.A., 723 F.2d 1440, 1447 (9th Cir. 1984). As with judicial review under the Administrative Procedure Act (APA), this Panel must affirm FEMA's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971); Friends of the Earth v. Hintz, 800 F.2d 822, 830-831 (9th Cir. 1986). A final agency decision is entitled to a presumption of regularity and must be upheld as long as there is a rational basis for it. Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 415; Friends of the Earth v. Hintz, 800 F.2d at 831. Under the "highly deferential" standard of APA review, this Panel, like a court, "may not substitute [its] judgment for that of the agency" but instead must presume "the agency action to be valid and [will affirm] the agency action if a reasonable basis exists for its decision." Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1075-76 (9th Cir. 2006)(internal citations omitted).

Appeals and Arbitration

The Stafford Act authorizes appeals of PA decisions. See 42 U.S.C. § 5189(a). There are two levels of appeal; the first to the Regional Administrator, the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. § 206.206(b). The American Recovery and Reinvestment Act of 2009, P.L. 111-5, establishes a new option for arbitration under the PA program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX, and DR-1607-LA.⁴ See 44 C.F.R. § 206.209. The arbitration panel's decision shall constitute the final decision on the issue under dispute, is binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. See 44 C.F.R. § 206.209(k)(3).

The Disaster Declaration

On August 29, 2005, the President issued a major disaster declaration for the State of Mississippi as a result of Hurricane Katrina pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5170. This declaration authorized all categories of Public Assistance, including emergency protective measures. See Presidential declaration for Mississippi, DR-1604-MS, attached hereto and incorporated by reference herein as FEMA Exhibit 1. Emergency protective measures include measures necessary to save

⁴ Approved disaster requests are assigned serially ordered major disaster declaration numbers beginning with declaration #1, a Georgia tornado approved by President Eisenhower in May 1953.

lives, to protect public health and safety, and to protect improved property including, but not limited to emergency shelter. See 42 U.S.C. § 5170b; and 44 C.F.R. § 206.225. The President's declaration included assistance for Hancock County, Mississippi, wherein BWSD is located, making BWSD eligible to apply for FEMA Public Assistance for reimbursement of eligible emergency protective measures and permanent restorative work.

BWSD Grant Applications

At the time of the disaster, BWSD had four school campuses and several administrative facilities. Each school campus had multiple facilities which housed classrooms and administrative offices.

BWSD submitted a request for Public Assistance to the State on September 17, 2005. FEMA met with BWSD on September 22, 2005. Federal regulations require BWSD to provide an authorized representative to ensure that BWSD identify all eligible work and submit all costs for disaster-related damage to FEMA. See 44 C.F.R. § 206.202 (d).

FEMA, the State, and BWSD conducted an initial site inspection of BWSD facilities on September 27, 2005. See BWSD's Case Management File attached hereto and incorporated by reference herein as FEMA Exhibit 2. This initial inspection included an evaluation of damages to Bay High School, Bay Waveland Middle School, and Waveland

Elementary School, each of which is the subject of this dispute. FEMA project officers inspected each facility and reviewed damage that BWSD personnel identified.

After this inspection, FEMA began to prepare Category E permanent work PWs to enable BWSD to obtain financial assistance for its recovery efforts.⁵ See 44 C.F.R. § 206.202

(d). FEMA project officers assigned to the BWSD application included a registered professional engineer with thirty (30) years of structural engineering experience and a registered architect with more than twenty-nine (29) years of construction experience. See FEMA Staff Resumes attached hereto and incorporated by reference herein as FEMA Exhibit 3. In their preparation of BWSD's PWs, these project officers used damage assessments that BWSD's architect developed, photographic evidence collected by the project officer team, facility blueprints, and other materials relating to the pre-disaster design and construction of BWSD's facilities. See FEMA Project Worksheets for Bay High School, Bay Waveland Middle School, and Waveland Elementary School attached hereto and incorporated by reference herein as FEMA Exhibits 4, 5, and 6.

FEMA prepared a Category E PW for each eligible individual facility at each campus location. Id. FEMA also prepared additional Category E PWs for replacement of contents at each eligible facility. Each PW contained a description of disaster-related

⁵ FEMA characterizes disaster-related work broadly as Emergency Work and Permanent Work. FEMA has seven categories of eligible disaster-related work: Category A – Debris Removal; Category B – Emergency Protective Measures; Category C – Roads and Bridges; Category D – Water Control Facilities; Category E – Buildings and Equipment; Category F – Utilities; and, Category G – Parks, Recreational Facilities and Other Items.

damage, a scope of work (“SOW”) to repair or replace damaged facility elements or components, and an estimate of costs to accomplish the eligible work.

After preparing the initial PWs, FEMA project officers continued to make inspection trips to BWSD facilities and, based on the inspections, continued to revise and adjust the scopes of work for these PWs. Overall, FEMA prepared 79 project worksheets to document damage and estimated eligible repair and replacement costs in support of the full recovery of BWSD. These included 10 PWs for debris removal and emergency protective measures at BWSD’s campuses.

FEMA prepared 68 PWs to cover eligible damages and repair and/or replacement costs for school facilities and facility contents. See FEMA Exhibit 2. FEMA estimated the costs of eligible permanent repairs to be \$59,038,635 for school facilities, replacement of contents, and the permanent relocation of one elementary school for BWSD. After the required deductions for insurance proceeds, FEMA obligated \$46,180,182 for the permanent repair of BWSD’s school facilities, and replacement of textbooks, and other facility contents. See BWSD Insurance Allocation to Project Worksheets Summary attached to and incorporated by reference herein by FEMA Exhibit 7.

In accordance with the Stafford Act, 42 U.S.C. § 5155, and FEMA Public Assistance policies, FEMA insurance specialists reviewed BWSD’s insurance documentation in order to determine the amount of anticipated insurance proceeds available for eligible repair/replacement costs. See FEMA Public Assistance Fact Sheet 9580.3, Insurance

Considerations for Subgrantees, August 23, 2000, attached hereto and incorporated by reference herein as FEMA Exhibit 8. BWSD had no flood insurance coverage. BWSD received insurance settlements totaling \$13,274,250 for facility damages and contents replacement. FEMA allowed for \$398,396 in legal fees which enabled BWSD to obtain the settlement and deducted the remaining \$12,875,854 from BWSD's total project costs See 44 C.F.R. § 206.253. FEMA allocated these proceeds against eligible costs on BWSD's Category E permanent repair PWs. See FEMA Exhibit 7.

FEMA's Public Assistance grant program, together with Direct Federal Assistance (DFA), enabled BWSD to meet the Mississippi State Board of Education's mandate to re-open schools by November 7, 2005. FEMA's Public Assistance grant program supported BWSD's efforts to clear debris from campuses, clean facilities, and make temporary repairs to classrooms and administrative offices. For facilities that required extensive repairs, FEMA provided modular classrooms through a Mission Assignment to the U.S. Army Corps of Engineers to house students, teachers, and administrative officials until permanent repairs at damaged facilities were complete.

Through these efforts, the facilities at issue in this arbitration request – Bay High School, Bay Waveland Middle School and Waveland Elementary School - are occupied and fully performing their pre-disaster function. BWSD started using the facilities in dispute when teachers and students returned to school in November 2006. See 44 C.F.R. § 206.226.

BWSD now contends that FEMA's PWs for the three schools do not reflect all disaster-related damage that BWSD asserts should be eligible to repair each facility to its "pre-disaster design, function, and capacity." See 44 C.F.R. § 206.226. On May 15, 2009, the State's Mississippi Emergency Management Agency ("MEMA") formally requested that FEMA review its eligibility determinations for 12 of BWSD's PWs for Bay High School, Bay Waveland Middle School, and Waveland Elementary. See FEMA Exhibits 4, 5, and 6. The State calculated the total costs of this purported additional damage to be \$7,216,656. See the State's request attached hereto and incorporated by reference herein as FEMA Exhibit 9.

In May 2009, FEMA re-inspected these facilities and determined that \$176,407 of the requested amount in repair costs is eligible for FEMA's Public Assistance grant funding. FEMA revised the relevant PWs accordingly. FEMA denied the remainder of BWSD's request because FEMA's technical experts could not substantiate that Hurricane Katrina caused the damage. See 42 U.S.C. § 5172; 44 C.F.R. § 206.223. In lieu of an appeal, BWSD has requested that an arbitration panel evaluate its request for \$7,273,082.43 for the additional repair/replacement costs that FEMA determined were ineligible for Public Assistance funding.

PROCEDURAL HISTORY

On September 29, 2006, BWSD's authorized representative affirmed that FEMA had completed all damage surveys and that all disaster damage had been recorded on project

worksheets. Over 32 months later, on May 31, 2009, BWSD requested FEMA re-inspect its facilities. On August 3, 2009, BWSD received FEMA's determination partially denying funding for all increases to the scopes of work requested for Bay High School, Bay Waveland Middle School, and Waveland Elementary School. BWSD has not appealed FEMA's determinations of eligible scopes of work for the disputed PWs or the insurance proceeds reduction taken on the disputed PWs.

In accordance with 44 C.F.R. § 206.209, BWSD chose to request arbitration rather than file an appeal with FEMA. BWSD argues in its request for arbitration that FEMA has denied eligibility for work items which were required as a result of disaster damage and should be eligible for Public Assistance grant funding. BWSD requests arbitration seeking \$7,273,082.43.

DISCUSSION AND ANALYSIS

BWSD'S Claims are not Eligible for PA Grants

A major disaster is by definition an event for which Federal assistance is necessary "to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby." See 42 U.S.C. § 5122(2). As part of the process of "alleviating the damage, loss, hardship, or suffering," the Stafford Act authorizes assistance for "the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a

major disaster.” See 42 U.S.C. § 5172 (a) (1) (A). Federal regulations are clear that the work must be eligible work and must be required as the result of a major disaster event. See 44 C.F.R. § 206.223(a)(1). The basis for FEMA’s denial of BWSD’s May 2009 request is summarized as follows:

1. BWSD’s additional repair costs are ineligible because Hurricane Katrina did not cause the damage to the facilities as required by Federal regulation. See 44 C.F.R. § 206.223(a) (1).

BWSD argues that FEMA’s PWs are insufficient in that they omitted damage that BWSD asserts should have been included as eligible repairs to the facility “so that it can perform the function for which it was being used as well as it did immediately prior to the disaster.” See Applicant’s Arbitration Request, paragraph 2 at page 9 citing 44 C.F.R. § 206.226. Specifically, BWSD asserts that FEMA’s PWs for facility repairs did not fully capture roof, window, and metal siding replacements, and that its estimates of the repair/replacement costs for this additional damage total \$7,273,082. FEMA disagrees with BWSD’s argument. The additional costs that BWSD requested are not eligible for reimbursement under the Public Assistance program. As discussed below, FEMA has substantiated that the costs in dispute were not caused by Hurricane Katrina. See 44 C.F.R. § 206.223.

a. BWSD's original request for damages

Immediately after Hurricane Katrina and continuing for months afterwards, FEMA project officers inspected BWSD's facilities and prepared Category E PWs to document damage and associated eligible repair costs. In this process, FEMA project officers relied extensively on damage assessments that BWSD's architect prepared dated September 23, 2005, and BWSD's roofing consultant report dated April 24, 2006. See BWSD architect and roofing consulting reports attached hereto and incorporated by reference herein as FEMA Exhibit 10.

FEMA does not dispute that Hurricane Katrina damaged BWSD's facilities. FEMA captured disaster-related damage in the damage descriptions included in the relevant PWs. The arbitration request asserts that the previously unclaimed damage now claimed resulted from "consistent winds of 140 mph." See Applicant Exhibit A, paragraph 3 at page 1. The reports BWSD submitted do not support this assertion. In fact, the weather data that BWSD submitted shows maximum *average winds* of 100 mph, with gusts of up to 140 mph for one hour at one location only. See Applicant Exhibit B at pages 13-16. The weather data do not specify the frequency of these gusts. In short, BWSD has overstated the potential impact of wind on roofs and other structures.

FEMA further notes that all damage assessments, which were developed both by BWSD's consultants and FEMA's technical experts, were based on visual observations

and pursuant to standard procedure. At no point in this process did FEMA or BWSD conduct destructive testing of the building components in this dispute.

b. Insurance coverage

FEMA policies are clear that disaster assistance will not be provided for damages or losses covered by insurance. Title 44 C.F.R. § 206.253 (a) further directs that FEMA will reduce the eligible costs by the actual amount of insurance proceeds relating to the eligible costs. FEMA policy directives specify that this means that “Disaster assistance will not be provided for damage or losses covered by insurance. Insurance coverage must be subtracted from all applicable PA grants in order to avoid duplication of financial assistance.” See 42 U.S.C. § 5154 and FEMA Exhibit 8.

BWSD did not carry flood insurance, but did have wind coverage for buildings and contents for named windstorm events that totaled over \$29 million on three policies. BWSD received \$1 million from the Mississippi Wind Pool Policy and a total of \$4 million from the second layer of wind coverage provided by a Lloyd’s of London (“Lloyds”) Wind Policy. BWSD had a third layer of wind coverage with a second Lloyd’s of London property policy. Lloyds made an initial settlement award in the amount of \$314,250.26 based on its assessment of eligible wind damage under these policies. BWSD disputed this amount and refused to sign any final settlement agreement with Lloyds. In January 2008, Lloyds sued BWSD to force a final resolution to the

claim. See Lloyds of London v. BWSD attached hereto and incorporated by reference herein as FEMA Exhibit 11.

On February 29, 2008, BWSD accepted a negotiated settlement with Lloyds; FEMA was provided a copy of a settlement check for \$7,960,000 as a result of this litigation.

Consequently, based on documents provided by BWSD for all insurance policies, FEMA determined that BWSD received insurance settlements totaling \$13,274,250.26. See copies of both settlement checks and a signed release attached hereto and incorporated by reference herein as FEMA Exhibit 12. Despite FEMA requests, BWSD did not provide FEMA any settlement documents other than copies of the cancelled checks received from its insurance companies and a signed final release. See BWSD insurance policies and documentation attached hereto and incorporated by reference herein as FEMA Exhibit 13.

BWSD did not provide FEMA with a final Statement of Loss from any of the carriers detailing how these insurance proceeds were to be allocated among BWSD's damaged facilities. In accordance with Federal regulations, therefore, FEMA insurance specialists were left to allocate BWSD's insurance proceeds against eligible assistance costs in each relevant PW. First, FEMA determined that none of the wind proceeds would be used to reduce the eligible cost on PWs written specifically for building contents replacement, as these damages were primarily the result of flooding. Second, FEMA deducted \$17,401 in insurance proceeds from two (2) PWs, which were written to address temporary roof repairs required as a result of wind damage. FEMA insurance specialists allowed for

\$398,396 for legal fees and then deducted the remaining balance of the wind insurance proceeds, \$12,875,854. This deduction was proportionally allocated across the remaining Category E facility repair/replacement PWs to ensure that no duplication of benefits had occurred. See FEMA Exhibit 7.

c. Second inspection

Pursuant to the State's request, FEMA conducted a second inspection on May 28, 2009. FEMA dispatched experienced technical experts, including Henry Riegler, to conduct the second inspection. Mr. Riegler is a registered architect with 45 years experience in the construction industry. He has extensive experience in assessments of hurricane-related facility damage in Florida, Louisiana, and Mississippi. Mr. Riegler invited BWSD's representative to direct him to the "worse case" examples of the additional damage claimed in the arbitration request. FEMA's re-inspection of this purported damage, as identified by BWSD's representative, lasted approximately five (5) hours. Furthermore, as preparation for the second inspection, FEMA technical experts consulted roofing, window pane, and siding manufacturers. The purpose of these consultations was to ensure that FEMA had a comprehensive assessment of the potential causes of roof failure, for example, and a list of visual indicators of such failure. See Manufacturers' Information on Roofing and Window Thermo-glazing attached hereto and incorporated by reference herein as FEMA Exhibit 14.

As noted above, Federal regulations require Subgrantees to identify all eligible work.

See 44 C.F.R. § 206.202 (d). Based on the visual inspections conducted by both FEMA and BWSD, FEMA concluded that much of the external facility damage that BWSD identified was already recorded in existing PW damage descriptions. FEMA's technical expert observed, however, that BWSD had completed few repairs by the time of the re-inspection. See FEMA Exhibits 4, 5, and 6.

In summary, the results of the May 2009 inspection were as follows: FEMA determined that a limited number of additional work items that could be attributed to disaster damage from Hurricane Katrina were eligible for Public Assistance and, FEMA denied eligibility for full replacement costs for roofs, metal siding, and windows at Bay High School, Bay Waveland Middle School, and Waveland Elementary School. See FEMA inspection report attached hereto and incorporated by reference herein as FEMA Exhibit 15. Thus, of the additional requested costs, FEMA determined that a total of \$176,407 in additional damages and associated costs would be eligible for Public Assistance. FEMA subsequently revised relevant PWs in accordance with its inspection. See FEMA Database Tracker Report attached hereto and incorporated by reference herein as FEMA Exhibit 16.

The following details the results of FEMA's re-inspection of the schools. The cost estimates for repairs to each item listed below do not include fees for profit, overhead, taxes or architect/engineering services. In addition to repair costs, BWSD is requesting eligibility for \$1,900,697.69 for these fees.

i. Damage to Roofs at Bay Waveland Middle School and Bay High School

BWSD requested an additional \$4,329,703 to replace roofs at three facilities on two campuses. It provided the following breakdown of estimated costs:

Bay Waveland Middle School	PW 930	\$3,386,492
Bay High School Math Classrooms	PW 9395	\$ 459,795
Bay High School Social Studies Bldg	PW 9397	<u>\$ 483,416</u>
	Total:	\$4,329,703

For Bay Waveland Middle School, BWSD asserts that the entire standing metal seam roof system must be replaced as a result of damage suffered in the disaster. In its initial PW, FEMA had determined that 30,000 square feet (SF) of the facility's roof was damaged by the disaster and was eligible for \$420,000 of repair cost assistance. This damage was identified in an inspection by a FEMA Registered Roof Consultant dated January 30, 2006. The FEMA Roof Consultant concluded that, if and when BWSD completed these eligible repairs, the remainder of the Middle School roof "should serve its intended purpose." See FEMA Roof Inspection Report attached hereto and incorporated by reference herein as FEMA Exhibit 17.

At the May 2009 re-inspection, FEMA noted that BWSD had not begun the repairs at Bay Waveland Middle School listed in PW 930 that FEMA approved for funding more than three (3) years earlier. For example, FEMA's 2006 damage report noted that panels had been blown off one wing of the roof. Id. During the May 2009 re-inspection, FEMA's technical expert observed that BWSD had yet to replace those roof panels or undertake any other of the repairs FEMA had approved in PW 930. Based on his inspection, FEMA's technical expert determined that beyond the original 30,000 SF deemed eligible for assistance, he could only identify another 1,500 SF that could be eligible for additional repair assistance. FEMA revised PW 930 to increase funding by \$12,630, to \$432,630 for repairs to Bay Waveland Middle School's roof.

FEMA's technical experts had consulted roofing manufacturers, particularly suppliers with experience in the Gulf Coast. According to these manufacturers, failure in metal roofing systems, of the type used for these facilities, is typically caused by the spreading or opening of seams in the panels. In turn, this would trigger failure of roof panel fasteners. See FEMA Exhibit 14. BWSD did not show FEMA's technical experts any such indicators at any of these three schools during either their January 2006 or May 2009 inspections.

BWSD's arbitration request also cites scratches, scrapes, and gouges on (unspecified) roofing panels as indicative of damage suffered during the 2005 major disaster. As noted earlier, FEMA did allow for the replacement of 30,000 SF of roofing panels at Bay Waveland Middle School after the initial inspections confirmed the damage was the

result of Hurricane Katrina. According to information provided by roofing manufacturers, scratches, scrapes, and gouges are not indicative of total roof system failure, as alleged by BWSD. Id.

By May 2009, BWSD had not completed the repairs FEMA determined eligible in the initial FEMA PWs and was unable to identify with particularity any additional damage or indicators of total roof system failure at any of the school facilities in dispute. Consistent with the FEMA Roof report of January 30, 2006, FEMA continued its denial of eligibility for a full roof replacement for Bay Waveland Middle School as Federal regulations limit eligibility to that portion of the roof exhibiting disaster-related damage. See FEMA Exhibit 15; and 44 C.F.R. § 206.223.

BWSD also seeks a grant to replace the roofing systems for both the Math and Social Studies Buildings at Bay High School. In the initial PWs, FEMA allowed for \$17,410 for repairs to the roofs at these facilities. By January 2006, FEMA's Registered Roof Consultant concluded that the roof on the Math Building had exhibited pre-disaster damages, was "worn out pre-storm and need(ed) attention." He found no loose panels and concluded "This roof is in good operating condition and storm damage could not be found." See FEMA Exhibit 17.

This determination was confirmed in BWSD's roofing consultant report, dated April 24, 2006, which states that "(t) here is a minimum of surface damage to the roof

panels” at both facilities. See FEMA Exhibit 10. FEMA’s inspection of May 2009, uncovered no further evidence of disaster-related damage at Bay High School.

In summary, at the inspection in May 2009, FEMA could only identify another 1,500 SF at Bay Waveland Middle School that was eligible for additional roof repair assistance resulting from Hurricane Katrina. FEMA did not identify any additional damage at Bay High School resulting from Hurricane Katrina. In addition, FEMA noted that many of the repairs previously identified as eligible for these facilities had not been completed in the three years between requests. Therefore, BWSD’s request for additional roof repair costs for Bay Waveland Middle School and Bay High School should be denied because these were not required as the result of the major disaster event in accordance with Federal regulation. See 44 C.F.R. § 206.223(a)(1).

**ii. Damage to Windows at Waveland Elementary, Bay High School
and Bay Waveland Middle School**

BWSD seeks an additional \$518,902 to replace windows at three facilities on three campuses. BWSD provided the following breakdown of estimated costs:

Waveland Elementary South	PW 7803	\$ 64,261
Waveland Elementary North	PW 7807	\$ 37,741
Bay Waveland Middle School,	PW 930,	<u>\$416,900</u>
Bay High School	PWs 9307, 9316, 9368, 9395, 9397 9427, 9681, 9682	
	Total:	\$518,902

BWSD asserts that high winds caused windows to fail at all of the facilities at issue in this arbitration request, but states that this damage has only become apparent over time. The arbitration request refers to pitted aluminum frames, deteriorating window seals, moisture between window panes, stress in windows, scratches, and window “rattling” as indicative of total window system failure at each of the facilities cited. See Applicant Request at pages 6-7.

FEMA’s original scope of work for these facilities, as reflected in the PWs, was based on FEMA’s inspection and the scope of work developed by BWSD’s architect firm and performed by BWSD’s construction contractor. See FEMA Exhibits 4, 5, and 6. The PWs address both work completed and work to be completed as of July 2006. FEMA notes BWSD’s 2005 architect report made no provision for window replacements in its scope of work for repairs to these facilities. See FEMA Exhibit 10.

During the May 2009 re-inspection, FEMA requested that the BWSD representative select examples of the “worst case” window damage for inspection. All windows shown to FEMA by the BWSD representative were aluminum framed glass windows and also aluminum framed windows with polycarbonate glazing. FEMA observed that all windows inspected were of moderate quality and gave the appearance of weather-related deterioration. See FEMA Exhibit 15. FEMA technical experts observed no stress cracks or deformities in any of the aluminum windows inspected in May 2009. Id. FEMA did observe pitting on aluminum window frames, but notes that aluminum has a tendency to pit, particularly in proximity to large bodies of salt water such as the Mississippi Sound and Gulf of Mexico. See FEMA Exhibit 14.

Also during the May 2009 re-inspection, FEMA observed that the scratches reported on the polycarbonate coated windows were superficial and not representative of damage that could be inflicted by flying debris. See FEMA Exhibit 15. FEMA observed that these scratches more likely represented normal wear on these surfaces. Id.

In BWSD’s arbitration request, BWSD makes reference to moisture between window panes as indicative of storm damage to these windows. BWSD’s representative provided no examples of damage to thermopane glass units at any of the facilities cited in the additional request. FEMA discussed thermopane glass unit failure with manufacturers who noted that thermopane has a 10-12 year life expectancy prior to seal failure. One school facility is more than 10 years old and the rest of the facilities are over 20 years

old; BWSD provided no information to indicate that the windows in these facilities had been replaced since the original construction. As noted above, FEMA's technical expert observed no deformities or stress cracks in any of the aluminum framed windows. Both trade literature and manufacturers' data confirm that windows receiving sun exposure generally experience earlier failure. State technical experts informed FEMA that the "thermopane glazing" as it is referenced in the arbitration request faces in a westerly direction with direct sun exposure. See FEMA Exhibit 14. FEMA observed no other storm related damage to thermopane glass units. See FEMA Exhibit 15.

Finally, with regard to window "rattling," FEMA concluded that this was most likely caused by deteriorated weather stripping. Id. Weather stripping deteriorates over the years both from age and use, whether it is used on doors or windows. Weather stripping is a maintenance item and not a repair required as a result of Hurricane Katrina. Id.

At the May 2009 re-inspection, FEMA noted that the original PW 930 for Bay Waveland Middle School approved replacement of 30 windows at that facility for Public Assistance. In its arbitration request, BWSD is seeking funds to replace 62 windows. However, when FEMA inspectors revisited the facility in May 2009, there was no indication that BWSD had taken any action to replace the 30 windows that were already deemed eligible in October 2005. FEMA observed no additional damage that could be attributed to Hurricane Katrina.

In summary, at the inspection in May 2009, FEMA was unable to substantiate that any of BWSD's additionally claimed damage was caused by Hurricane Katrina. Therefore, all of BWSD's additional window repair costs for Bay High School, Bay Waveland Middle School and Waveland Elementary School were ineligible. The additional damage claimed was not the result of the major disaster event in accordance with Federal regulation. See 44 C.F.R. § 206.223(a)(1).

iii. Damage to siding at Bay High School

BWSD requested an additional \$523,780 to replace metal siding on five facilities at Bay High School. BWSD provided the following breakdown of estimated costs:

Bay HS Auditorium	PW 9305	\$ 95,847.05
Bay HS Gym	PW 9307	\$252,315.33
Bay HS Social Studies Bldg	PW 9397	\$ 47,923.53
Bay HS Math Bldg	PW 9395	\$ 86,016.59
Bay HS Fine Arts/Band Bldg	PW 9682	<u>\$ 41,677.09</u>
	Total:	\$523,779.60

BWSD asserts that siding panels were damaged by flying debris and high winds, as evidenced by photographs submitted with the arbitration request. See Applicant Arbitration Request Item No. 3 at page 7. FEMA concurred in the original inspections in 2005 and 2006 that siding panels suffered disaster-related damages and FEMA included

panel replacements in PWs for these facilities. See FEMA Exhibits 4, 5, and 6. FEMA allowed replacement of 2,725 SF of paneling at an estimated cost of \$37,395 on Bay High School's facilities.

During FEMA's May 2009 re-inspection, FEMA's technical expert observed that BWSD had yet to make any of the siding repairs or replacements already made eligible by FEMA in the relevant PWs. See FEMA Exhibit 15. BWSD's assertions regarding paneling are based on its consultant's inspections in early 2007. FEMA's re-inspection confirmed its initial assessments of eligible damage. Id. BWSD does not assert in its arbitration request that its consultants identified damaged panels beyond those already made eligible in FEMA's existing PWs. Photographs depicting this damage, provided in BWSD's consultants' reports, appear to be duplicative of the damage already identified by FEMA in 2005 and 2006.

Consequently, the main issue for BWSD in its arbitration request centers on its assertions about the purported difficulty of matching existing panels and "appearance issues." Further, BWSD raises concerns about "oxidation rates" of new versus existing panels. BWSD asserts that its experts "have opined that it is not practical or economical to repair siding in this fashion (replacement of damaged panels only) since the manufacturers are not known, panel dimensions and fastening systems vary, and finishes would not match." See Applicant Arbitration Request at page 8.

BWSD asserts that replacement panels would not perform their function as well as those in place before the disaster. It is the responsibility of BWSD's architect and engineering firm, not FEMA, to identify the panels' manufacturer, type of fastening devices used, and other installation details assuming that documentation in the form of specifications, shop drawings or application for payment does not exist or is lost. FEMA notes that there are more than 30 major manufacturers of siding panels and numerous other smaller manufacturers. See list of manufacturers attached hereto and incorporated by reference herein as FEMA Exhibit 18. BWSD provided no documentation to indicate that it has made any effort to match the existing panels.

BWSD also asserts that it would be unable to match the color or finish of existing panels, which would result in a varying appearance over time. FEMA notes that it is common knowledge that paint manufacturers have the technology to match any color in most types of paint available (Sherwin-Williams, Valspar, Behr). In addition, BWSD's concerns about the oxidation rate on paint surfaces are also without merit. While finish materials would result in a different appearance over time, FEMA notes that there are numerous commercial finish applications available that minimize or eliminate oxidation altogether.

BWSD's request for full replacement cost eligibility for siding paneling is based on its assertion that replacement panels "would not enable the siding to perform as well as it did prior to the disaster." See Applicant Request at page 8. This assertion is without merit and is a misinterpretation of the statute. BWSD cites 44 C.F.R. § 206.226(d)(1), however, the applicable cite is actually 44 C.F.R. § 206.226(f)(1). The pertinent section

states: "...is feasible to repair *the facility* so that it can perform *the function* for which it was being used as well as it did immediately prior to the disaster." (emphasis added).

This provision pertains to repairing the overall facility to the function it had prior to the disaster; it does not refer to the function of individual materials used in the facility.

In summary, Federal regulations limit FEMA assistance to items of work required as the result of a major disaster. See 44 C.F.R. § 206.223. FEMA has made replacement of damaged panels on the facilities requested eligible for public assistance in accord with Federal regulations.

2. BWSD did not request FEMA re-assess its estimates of eligible damages until nearly forty-four (44) months after Hurricane Katrina and thirty-two months after the FEMA/Grantee/Subgrantee "Exit Interview".

Federal regulations assign to Subgrantees such as BWSD, responsibility to identify and report to FEMA all eligible work for inclusion in PWs.

a. BWSD Did Not Submit its Additional Damage Claims in a Timely Fashion

FEMA records show BWSD's Kickoff Meeting was held on September 22, 2005. At the Kickoff Meeting, FEMA provides Subgrantees information regarding eligibility and documentation requirements for the preparation of PWs. See Public Assistance Guide FEMA 322, page 67 attached hereto and incorporated by reference herein as FEMA

Exhibit 19. Therefore, in accordance with Federal regulations, BWSD should have identified all damaged facilities to FEMA by the end of November 2005. See Chronology of dates and events for BWSD's Federal assistance attached hereto and incorporated by reference herein as FEMA Exhibit 20.

Given the magnitude of the disaster, FEMA allowed more time for Public Assistance Subgrantees to identify storm-related damage to these facilities to FEMA. Throughout the remainder of 2005 and well into 2006, FEMA project officers continued to work on BWSD's PWs for Category E. By September 29, 2006, BWSD officials were sufficiently satisfied by FEMA's progress to agree to conduct an Exit Interview. Id.

FEMA procedures stipulate that FEMA will conduct an Exit Interview with a Subgrantee after FEMA, the Grantee and Subgrantee have completed all PWs for the Subgrantee. The purpose of the Exit Interview is to document concurrence from FEMA, the State, and Subgrantees (such as BWSD) that all relevant disaster-related damages to subgrantees' facilities have been recorded and associated repair and/or replacement costs have been estimated. At the Exit Interview, the Subgrantee, Grantee and FEMA project officers review the status of the Subgrantees's PWs and provide participants the opportunity to raise concerns or objections to FEMA grant determinations. Also at the Exit Interview, FEMA informs Subgrantees of their right to appeal any FEMA decision and that they have 60 days from the date of receipt of notice of a FEMA decision to file such an appeal.

BWSD's Exit Interview took place on September 29, 2006. Id. At that interview, the Subgrantee's authorized local representative, the then-School Superintendent, affirmed, "damage surveys in all categories of work are completed and all Project Worksheets are written." See Exit Interview Memorandum for Record attached hereto and incorporated by reference herein as FEMA Exhibit 21. The only exceptions noted by BWSD's authorized local representative at the Exit Interview concerned parochial school computers and architecture and engineering fees for BWSD's Second Street Elementary School, which is not the subject of this dispute. Id.

In summary, FEMA allowed more than one (1) year between the Kickoff Meeting and the Exit Interview for BWSD to identify all additional damage for FEMA eligibility determinations, beyond that already recorded in the initial PWs. Additionally, BWSD had 60 days beyond September 29, 2006, to appeal FEMA's eligibility determinations. However, FEMA did not receive BWSD's request for a re-inspection and scope of work increases from the Grantee until May 21, 2009, nearly two and a half years after the appeal deadline. See FEMA Exhibit 20.

FEMA procedures also require project officers to submit PWs to Subgrantees for review prior to FEMA's entry of PWs into NEMIS, FEMA's PW processing and obligating system. BWSD officials signed each PW submitted for their review, thus indicating concurrence with the damage description and scope of work for each facility under review. FEMA records contain no indication of a formal challenge of any FEMA determination during this period. See FEMA Exhibits 4, 5, and 6.

Specifically related to the timing of BWSD's request for additional costs, as an example, BWSD now seeks eligibility for full replacement costs for windows at Bay High School, Bay Waveland Middle School, and Waveland Elementary School. BWSD fails to explain, however, why it waited nearly four (4) years after Hurricane Katrina made landfall on August 29, 2005 to request eligibility for these items or why it waited nearly four (4) years to seek cost estimates for this work from potential suppliers. See Applicant Exhibit O. Nor does BWSD explain why its officials concurred with FEMA PWs for these facilities in 2005 and 2006, despite the fact that window replacements were not listed as eligible repairs in most of these PWs. While there may be circumstances where disaster damage is hidden and discovered long after the event, when the damages are identified they have to be shown to be disaster-related. Damage of the type claimed by BWSD should have been evident in the aftermath of the major disaster.

b. Damage Caused by Hurricane Gustav is not Eligible for Arbitration

In September 2008, Hurricane Gustav, a Federally-declared disaster, struck Hancock County, wherein BWSD is located. Hurricane Gustav is reported to have produced 21 tornadoes in Mississippi. See National Hurricane Center, Tropical Cyclone Report for Hurricane Gustav attached hereto and incorporated by reference herein as FEMA Exhibit 22. FEMA records indicate that BWSD initially claimed \$4,113,699 in damage resulting from Hurricane Gustav, including roofing and siding damage at the facilities under

dispute in this request. See BWSD's Reported Damage from Hurricane Gustav attached hereto and incorporated by reference herein as FEMA Exhibit 23.

Further, a university professor's report prepared for another Hancock County recipient of FEMA Public Assistance for damage resulting from Hurricane Katrina noted that the area in and around BWSD experienced "storms with some of the strongest winds since Hurricane Katrina" in the Spring of 2008. This report noted that many trees in this area were blown over during these severe storms. See "Long-term Impacts of Hurricane Katrina on Trees Not Subject to the Storm Surge" attached hereto and incorporated by reference herein as FEMA Exhibit 24. Thus, there were several significant weather events that occurred in the interim between BWSD's exit interview in September 2006, and BWSD's 2009 request for additional damage that may have had a direct effect on BWSD's facilities.

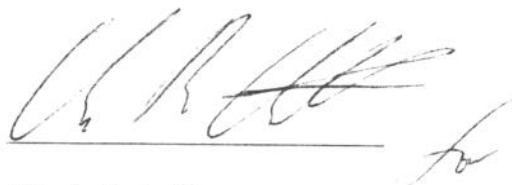
BWSD initially claimed \$4,113,699 in damage resulting from Hurricane Gustav. This damage claimed included roof damage at Bay Waveland Middle School and Bay High School's Math and Social Studies Buildings, facilities under dispute in this request. BWSD also claimed siding damage at Bay High School's Social Studies building and window damage at Bay Waveland Middle School, work items also at issue in this request. FEMA denied much of this claim for Hurricane Gustav and a large portion of the remaining claim was covered by insurance. In the end, FEMA reimbursed BWSD \$4,415.64 for Hurricane Gustav-related damage. See FEMA Exhibit 23.

In summary, BWSD did not submit its request for FEMA assistance for this additional damage until well after the 2005 major disaster event and after the facilities had been subjected to another Federally-declared disaster event and additional weather-related actions. Clearly, BWSD failed to comply with Federal regulations that require identification and submission of all eligible work items to FEMA within specific time limitations. See 44 C.F.R. § 206.202(d) (ii).

CONCLUSION AND RECOMMENDATION

BWSD is not eligible under the Public Assistance grant program for additional FEMA reimbursement for the costs identified in its arbitration request since the additional costs in dispute were for damage that was not caused by Hurricane Katrina. See 44 C.F.R. § 206.223. Therefore, FEMA respectfully recommends that the Panel find in favor of FEMA and deny BWSD's request for additional Public Assistance funding.

Respectfully submitted on this 30th day of October 2009 by

A handwritten signature in black ink, appearing to read 'Elizabeth A. Zimmerman', is written over a horizontal line. To the right of the line, there is a small, stylized mark that looks like a lowercase 'h' or a flourish.

Elizabeth A. Zimmerman
Assistant Administrator
Disaster Assistance Directorate
Federal Emergency Management Agency

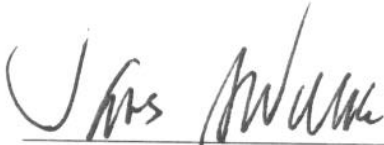
Attachments

SUMMARY SHEET

SUBJECT: FEMA Response to the Arbitration request of Bay St. Louis Waveland School District for additional funding for repairs to roofs, windows, and siding of several school districts (FEMA-1604-DR-MS; multiple PW's; Docket # CBCA 1739-FEMA).

ACTION OFFICER: Tod Wells (x3936); Jurice Hardin (x2931)


COORDINATION:



James A. Walke, Director
Public Assistance Division

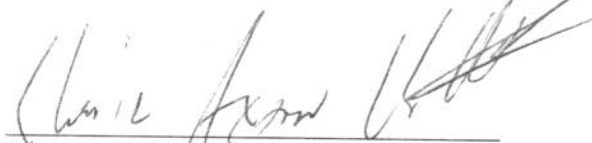
10-29-09

Date


Adrian Sevier
Deputy Chief Counsel

10/29/09

Date


Charlie Axton
Acting Deputy Assistant Administrator, DAD

10-29-09

Date